



Osgoode Hall Law School of York University
Osgoode Digital Commons

All Papers

Research Papers, Working Papers, Conference
Papers

11-1-2016

Designing Administrative Justice: Draft

Lorne Sossin

Osgoode Hall Law School of York University, lsossin@osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/all_papers



Part of the [Administrative Law Commons](#), and the [Courts Commons](#)

Recommended Citation

Sossin, Lorne. "Designing Administrative Justice: Draft" British Columbia Continuing Legal Education (BC CLE) Administrative Law Conference, November 18, 2016.

This Conference Paper is brought to you for free and open access by the Research Papers, Working Papers, Conference Papers at Osgoode Digital Commons. It has been accepted for inclusion in All Papers by an authorized administrator of Osgoode Digital Commons.

Designing Administrative Justice

Lorne Sossin¹

Draft – November 1, 2016

Introduction

This study explores the adaptation of design thinking to administrative justice. Design thinking – or human centred design – approaches services and products from the perspective of the user. This perspective too often is missing in the design of administrative tribunals, most of which have been developed top-down to serve the needs of a particular policy interest of the Government of the day. The administrative justice system in Canada at all levels of Government (federal, provincial, municipal, Indigenous) is generally fragmented, poorly coordinated, under-resourced in relation to the needs of its users and has multiple barriers of entry.

It has become trite to observe that courts – and most other dispute resolution bodies – have been designed by and for lawyers rather than clients. The rules of evidence, court forms, and jurisprudence all flow from the technical expertise lawyers acquire, use and replicate. The effect is to render users who either represent themselves or seek an active role in the process ineffective and alienated.

Administrative justice was supposed to be different. As Chief Justice McLachlin has observed, “In sum, without administrative tribunals, the rule of law in the modern regulatory state would falter and fail. Tribunals offer flexible, swift and relevant justice. In an age when access to justice is increasingly lacking, they help to fill the gap. And there is no going back.”²

Every tribunal that has been established reflects a core premise that an alternative to courts on the one hand and government on the other is both necessary and beneficial.³

¹ Dean and Professor, Osgoode Hall Law School, York University. I am grateful to Zachary Hershenfeld for his excellent research assistance and to Margaret Hagan, Nicole Aylwin, Monica Goyal, Nicole Salama, Shannon Salter, Linda Lamoureux and Michael Gottheil who all provided helpful input at different stages of this research. A version of this paper was provided as part of the 2016 BC CLE Administrative Law Conference.

² See “Administrative Tribunals and the Courts: An Evolutionary Relationship” Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, 6th Annual Conference of the Council of Canadian Administrative Tribunals, Toronto, Ontario, May 27, 2013 at <http://www.scc-csc.ca/court-cour/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>.

³ For a history of the development of administrative tribunals in Canada, see Law Reform Commission of Canada. *Independent Administrative Agencies Working Paper 25* (Ottawa: The Commission, 1980), at pp.17-32, at <http://www.lareau-legal.ca/LRCWP25.pdf>.

Often, tribunals are established in order to deploy a specific expertise beyond legal expertise – for example, the Competition Tribunal seeks to harness economic expertise while the Human Rights Tribunal seeks to harness anti-discrimination expertise. Some have suggested administrative justice constitutes a fourth branch of government, distinct from the legislature, judiciary and the executive.⁴ Most of these tribunals were created to provide more flexibility and greater access than Courts but sufficient distance from government. Too often, however, even tribunals designed to be informal and flexible have become “legalized” or “judicialized” whether because of growing complexity, anxiety about oversight by courts, or simply because lawyers have not been educated to imagine alternative ways of solving legal problems.

The notion that administrative tribunals are “designed” for particular goals is not new.⁵ Typically, however, discussions of design relate to clarity of statutory mandates, protections of tribunal independence, and the procedures and rules by which a tribunal will function. This literature critiques the structural design features – for example, in the appointments process - which can lead tribunals to be vulnerable to interference and explores the design features which can best enhance the rule of law.⁶

The design concerns I explore tend to arise subsequent to this “legal design” phase, once legislation to establish a tribunal and demarcate its powers has been enacted. It is often at that point that the functional design questions around how the tribunal actually will work come into focus (though of course attention to the lived experience of users in the legal design phase is also highly desirable).

When considering new tribunals or adding new mandates to existing tribunals, a number of design questions are highlighted. Should the tribunal be virtual (such as the Civil Resolution Tribunal of British Columbia, examined elsewhere in this volume⁷)? If physical, where should the tribunal be located (in one central location or many satellite storefronts?) and how will its services be accessed (on-line, by phone, in person or in combinations of all of these)? How many languages will the tribunal offer services in,

⁴ See France Houle, “Constructing the Fourth Branch of Government for Administrative Tribunals” (2007) 37 Supreme Court Law Review 1-21. See also Lorne Sossin, “The Ambivalence of Administrative Justice in Canada: Does Canada Need a Fourth Branch?” in *Lamer: The Sacred Fire*, eds. D. Jutras and A. Dodek (2009) 46 Supreme Court Law Review 51-75.

⁵ See Ron Ellis, “Administrative Tribunal Design” (1987) 1 Can. J. Admin. L. & Prac. 134. See also Priest, Margot. “Structure and Accountability of Administrative Agencies” (1992) Spec. Lect. L.S.U.C. 11.

⁶ This critique is particularly apposite in adjudicative rights-oriented tribunals. See Ron Ellis, *Unjust by Design Canada’s Administrative Justice System* (Vancouver, UBC Press, 2013).

⁷ See Shannon Salter’s reflections at [insert citation to paper in WYAJ].

and how will it accommodate people living with physical and/or cognitive disabilities or other impairments? How much will it cost people to use the tribunal and will all pay the same amount? How will its staff and members be trained to meet the needs of users? Will it adopt an adversarial system of dispute resolution, a mediation or arbitration process or a more inquisitorial set of procedures?

The questions suggested by design thinking are starkly distinct from the questions typically asked about tribunals within a policy context, or within the doctrines of administrative law and statutory drafting – which often relate to its jurisdiction, authority, rules, expertise, powers, method of appointment and independence. Further, under the current model, questions of statutory authority on the one hand, and budget and staffing for a tribunal on the other, are bifurcated. In a design thinking framework, bifurcating these key dynamics is neither possible nor desirable. Rather, design thinking puts a premium on holistic frameworks that link together issues of statutory jurisdiction with issues of user need so that resources, infrastructure, staffing, training and administrative structures. In short, tribunals have historically been structured through a top-down policy-making exercise, while design thinking leads by definition to a bottom-up process of determining the key features and functions of administrative tribunals.

This paper is divided into two parts. In the first part, I review the development of design thinking in the context of legal services and legal organizations. In the second part, I explore the implications of this development for administrative justice, particularly in the context of the establishment of new tribunals, and situate the evolution of design thinking in Canadian administrative justice within broader trends in the common law world. I conclude with the criteria I suggest should be applied to determine if the design of a new administrative tribunal is successful.

1. Design Thinking and Law

As Margaret Hagan has written, design methodologies have put an emphasis on quick prototyping, frequent testing, and (above all) a focus on making services that users will love to use.⁸ She explained the approach in the following terms:

[Design thinking] involves immersing yourself in the problem you are trying to solve, working with the people experiencing the problem, experimenting with solutions, and most importantly, lowering your defenses and opening yourself and your design team up to candid and uncensored feedback about what you are doing wrong (and hopefully some things you are doing right)!⁹

⁸ <http://www.slaw.ca/2014/06/16/cba-futures-chat-law-and-design/>.

⁹ Nicole Aylwin, “Human Centred Design and the Justice System” (June 6, 2016) at <http://www.slaw.ca/2016/06/06/human-centered-design-and-the-justice-system-lessons-from-the-field/>.

The methodology of design may differ across settings (for example, designing a product is distinct from designing a service, etc.) but generally involves these 6 steps:

1. beginning with empathy in order to fully understand the users of the services and the service ecosystem;
2. defining the problem collectively and from a user perspective;
3. brainstorming a multitude of potential solutions;
4. choosing the best solutions to prototype;
5. testing the prototypes; and
6. repeating steps 4 and 5 until the product or service is ready to implement (thought the process of adjustment and adaptation in relation to need is continuous)¹⁰

Another way of understanding design thinking is set out by Margaret Hagan:

1. Discover – what is the landscape? Understand the challenges situation and the stakeholders
2. Synthesize – what is your mission? Define and map the users and problem statement you’ll be designing for
3. Build – what ideas may work? Generate possible solutions for the problem and prototype them
4. Test – are the ideas worthwhile? Test promising prototypes with your users and in live situations
5. Evolve – how to move forward? Process the feedback, edit your prototypes and vet them¹¹

IDEO, a design company, has developed a “toolkit” for human centred design adopting elements of the above approaches (such as the importance of empathy for the user experience and revising design features based on observing user behaviour and integrating dynamic feedback).¹² According to IDEO, “[D]esigners trust that as long as they stay connected to the behaviours and needs of the people they’re designing for, their ideas will evolve into the right solution. In other words, they let the end-user tell them what they need to focus on building.”¹³

As these versions of design methodology emphasize, design thinking is focused primarily on process. The focus of design thinking is usability – including the ability to attract people to use a service because it engenders other positive attributes (whether because it is natural to use, easy to access, customized to a person’s distinct needs or identities, or simply because it is engaging). In this sense, a well-designed experience is not only

¹⁰ <http://winklerinstitute.ca/practice-pilots/>.

¹¹ Margaret Hagan, “Next Gen Legal Services: Possibility of Legal Design”, April 2015 at <http://www.legaltechdesign.com/>.

¹² <https://www.ideo.com/by-ideo/human-centered-design-toolkit>.

¹³ [Ibid.](#)

functional, but also engaging and appealing. Design thinking responds to a “crisis of legitimacy” in the legal system arising from the yawning gap between those who have access to legal services and those who do not.¹⁴

In the legal context, the design approach has focused in particular on how people access legal information. For example, Margaret Hagan’s Legal Design Studio projects have involved the “Mobile Legal Advocate,” which guides a person through the steps to access legal services by texting or social media platforms. The San Francisco Housing Law Triage aims to empower citizens facing eviction to navigate the legal system to better understand and assert their rights in that system. The Plea Agreement Project seeks to assist criminal defendants to better understand plea offers. Finally, the Immigration Navigator supports potential immigrants and refugees by providing checklists, timelines and reminders for different stages of the immigration approval process.

Early examples of the application of design thinking to law in Canada have focused on the access to justice and family law reform settings, and suggest important insights for how to apply design thinking in the context of administrative justice.

The Family Justice and Mental Health Social Lab, for example, aims to improve the experience of users of the family justice system who deal with mental health challenges. By bringing in and gathering the perspectives of social workers, lawyers, mental health workers, psychologists, family physicians, academics and children and youth advocates, the Family Justice and Mental Health Social Lab has developed three pilot projects that address family justice and mental health needs from a user perspective. These include: Track My Life, a mobile phone app that provides youth access to their basic information such as health card number, SIN number, medical records, court dates, driver’s license number, school records, etc. and access to important data and records; The Family Support Table, an alternative dispute resolution option that brings in a network of professionals such as psychologists, educators, financial planners, faith-based intermediaries, dieticians, among others, to work with families who are struggling with mental health and family justice issues; and Help, Educate, & Link Professionals, a confidential communication network that provides answers to questions by fellow professionals such as psychologists, lawyers, pharmacists, family doctors, and social workers who may need some general guidance or information related to family justice and mental health.

The Yukon Family Justice Design workshop incorporated ideas of human-centered design in order to brainstorm and prototype ideas to improve the experiences of clients in the family justice system. One particular improvement was in response to users indicating

¹⁴ For discussion, see in this volume, Susan Ursel, “Building Better Law: How Design Thinking Can Help Us Be Better Lawyers, Meet New Challenges and Create the Future of Law.”

that completing the necessary forms often induced stress and anxiety. The workshop and its human-centered design process came up with the foundation for the Yukon Simplified Form Innovation project that aims to solve this user issue.

In addition to these initiatives, there have been other platforms that have incorporated human-centered design methodology into legal practice. The Court Messaging Project aimed to make the court system more navigable and to improve a user's sense that the legal system is fair, comprehensible and user-friendly. The tool allows for the court to send automated messages with reminders and tips for litigants regarding their upcoming obligations..¹⁵ The Plea Agreement Project redesigned lengthy plea agreements into a clear, visual design, in terms that a non-lawyer can understand.¹⁶ The Navocado project seeks to enhance the legal processes by converting long documents into "interactive, tech-enabled, and user-friendly guides."¹⁷

These pilot initiatives indicate the importance of linking the policy aims of administrative bodies to multi-disciplinary and user-centred processes. These operational goals may relate to access generally (e.g. intake forms, etc) or to specific aspects of the policy sphere the tribunal governs or the kinds of people most likely to seek out the tribunal.

While some aspects of human centred design do not relate to specific technology initiatives in the delivery of legal information or services, the innovation sector in legal services is a key driver of the design thinking movement in law. So much so, that the focus of some organizations dedicated to access to justice are focusing on cohering and coordinating technical standards for litigation portals in order to ensure technology does not simply reproduce and exacerbate many of the current dysfunctions in the justice system (complexity, asymmetries of information and influence, barriers of entry, etc).¹⁸

There are other important aspects of design thinking relevant for legal systems generally. A key aspect relates to how legal information is communicated. Design thinking focuses not just on putting accurate information in places where it can be found (whether a text or monograph in a library, or more recently, updated websites and legal databases) but also on how such information can attract the users' attention, and how well such information is then connected to aspects of a legal process. In other words, the traditional separation between legal information (what are my rights?) and legal process (how can I assert or

¹⁵ <http://www.legaltechdesign.com/CourtMessagingProject/>.

¹⁶ <http://legaltechdesign.com/ThePleaAgreementProject/>.

¹⁷ <http://legaltechdesign.com/legalnavigators/>.

¹⁸ See Report: Building A Litigant Portal: Business and Technical Requirements (NSCS 2015)

<http://www.srln.org/node/629/report-building-litigant-portal-business-and-technical-requirements-ncsc-2015>.

protect those rights?) is blurred and ultimately eliminated in a designed approach to dispute resolution.

Design thinking also asks potentially disruptive questions about how information is conveyed in legal settings. For example, most legal information (and legal advocacy, for that matter) is communicated using the written word. This approach was well-suited to a culture based on written communications. In an increasingly visual and aural culture, will podcasts, animated images and documentary film take the place of written documents in legal communications? How might legal settings take advantage of interactive digital technology to create usable, satisfying communication experiences?

All of these efforts are aimed at improving service offerings and relationships with the users of the legal system, and also at developing a particular responsive and innovation oriented culture within the Tribunals themselves (including tribunal staff and tribunal members). This culture includes the ability to identify, reflect upon and attempt to improve inefficiencies or “fail points” in current practices, and foster collaboration across institutional silos or professional/disciplinary boundaries. In other words, the best way to resolve a dispute before a tribunal may involve a social worker rather than a lawyer, and the best way to design a tribunal may draw on expertise from retail and hospitality sectors as much as courthouses and government agencies. The goal is an experimental culture which embraces change, and empowers all members of the organization to solve problems and play an active role in improving tribunal operations.

Below, I apply some of these design thinking frameworks to contexts of administrative justice specifically. In so doing, I attempt to set the stage for a new kind of criteria for success by which administrative justice ought to be evaluated.

Part 2: Designing a New Framework for Administrative Justice

Some aspects of design thinking apply to all dispute resolution entities, whether courts, tribunals and to all dispute resolution mechanisms (mediation, negotiation, arbitration, adjudication, etc).¹⁹ Other aspects, however, I suggest are distinctive to administrative justice, and its policy environments. In other words, while all dispute resolution bodies and mechanisms seek to provide solutions to people’s problems, the entities and mechanisms which are part of administrative justice also seeks to advance a particular policy goal. A human rights tribunal is part of a scheme, for example, to create a society free from discrimination. A labour board is intended not just to resolve disputes but also to advance other policy goals (in Ontario, for example, the Act empowering the Board aims not just “to promote the expeditious resolution of workplace disputes” but also the “to encourage co-operative participation of employers and trade unions in resolving workplace issues” and “to recognize the importance of workplace parties adapting to

¹⁹ See, for example, W. David Ball, “Redesigning Sentencing” (2014) 46 McGeorge L. Rev. 817.

change,” among other priorities), and for that reason, its tripartite dispute resolution mechanisms constitute an appropriate design feature for its policy goals.²⁰

This policy aspect of administrative justice plays a key role in the design process. It also suggests the need for perspectives other than law/dispute resolution to inform the design of tribunals. In other words, designing administrative justice arguably should always include a legal perspective but should never include *only* a legal perspective.

Multidisciplinary approaches to dispute resolution are inherent to the sphere of administrative justice. For example, a consent/capacity board cannot be designed only with legal rights in mind, but also needs to consider medical and social considerations. These perspectives relate not only to the rules of practice for such a body but also to how vulnerable communities will access the board and how to ensure the interests of vulnerable individuals and the medical and social context of such individuals are appropriately considered.

Beyond the specific policy goals of the statutes empowering administrative tribunals, all administrative tribunals reflect important policy choices not to leave particular kinds of disputes to courts on the one hand, or to government itself on the other hand. Designers of administrative justice must also take this choice as a point of departure. For example, if a tribunal is designed to mirror a court in every respect, then arguably it has failed to reflect the legislature’s choice to assign disputes to the tribunal and not a court in the first place. Similarly, if the tribunal is designed with the same policy motivations and discretion as a government department, then it has failed to reflect the choice to create a body other than a government department to resolve the dispute. Thus, the critical design question for every tribunal is how in its process, the distinctiveness of tribunals both from courts and government is clear.

Finally, it is important to see administrative justice in the context of accessibility. Virtually all tribunals are justified as desirable models of dispute resolution because they can provide enhanced accessibility relative to Courts and other alternatives. Tribunals are often justified as providing less expensive, less formal and more specialized dispute-resolution. In *Rasannen v Rosemount Instruments Ltd*, Abella J.A. (as she then was), writing for the Ontario Court of Appeal, describes the role and function of administrative tribunals as follows:

They were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies. Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly.²¹

²⁰ *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A.

²¹ *Rasanen v. Rosemount Instruments Ltd.* (1994) 17 OR (3d) 267 (C.A.).

Sir Andrew Leggatt's comprehensive 2001 *Report of the Review of Tribunals* by Sir Andrew Leggatt: *Tribunals for Users - One System, One Service* which made recommendations for reform of Britain's tribunal system, commented,

Choosing a tribunal to decide disputes should bring two distinctive advantages for users. First, tribunal decisions are often made jointly by a panel of people who pool legal and other expert knowledge, and are the better for that range of skills. Secondly, tribunals' procedures and approach to overseeing the preparation of cases and their hearing can be simpler and more informal than the courts, even after the civil justice reforms. Most users ought therefore to be capable of preparing and presenting their cases to the tribunal themselves, providing they have the right kind of help. Enabling that kind of direct participation is an important justification for establishing tribunals at all.²²

While not invoking design thinking by name, Leggatt's analysis builds on a kindred set of values, noting, for example, "It should never be forgotten that tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases."

Tribunals, by their very nature, are flexible in their operational requirements, varying widely in size, process and mandates to address their particular statutory and policy contexts. There are approximately 235 tribunals in Ontario alone.²³

As Peter Cane has observed, far too little attention in public law has been devoted to administrative justice.²⁴ While in some jurisdictions such as the United Kingdom, adjudicative tribunals fall under the supervision of the judiciary, in Canada, the Supreme Court has confirmed that all administrative tribunals are a part of the executive branch of government, established by statute to further a policy objective.²⁵ Governments in Canada continue to experiment with different organizational models in their attempts to balance the policy mandate of tribunals with their adjudicative function, while working to

²² Andrew Leggatt, *Tribunals for Users: One System, One Service, Report of the Review of Tribunals*, March 2001, para. 1.2 [Leggatt Report], at <http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/>.

²³ https://www.attorneygeneral.jus.gov.on.ca/english/justice-ont/french_language_services/services/administrative_tribunals.php.

²⁴ See Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing 2009) and Peter Cane, 'Judicial Review in the Age of Tribunals' (2009) *Public Law* 479.

²⁵ *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at paras. 21-24.

improve accessibility for users and the quality of decision making.

As Jamie Baxter and I asserted in a study of Ontario's move to tribunal "clusters," referring to tribunals as part of an administrative justice "system" may reflect more of an aspiration than a reality:

The need for such change is evident. Claimants who come to administrative tribunals in Canada, as elsewhere, expecting a convenient forum to resolve their problems may discover that institutional resources and expertise, their own knowledge of the system, and their statutory entitlements and legal rights are fragmented between bodies with diverse norms and mandates. At least from a birds-eye view, the tribunal 'system' now looks more like an ad hoc assortment of isolated institutions than a coherent system of justice. Increasingly, it seems that the very structures and modes of organization behind the delivery of administrative justice may actually post barriers for users, even as they separate individual tribunals from the shared knowledge, practices and infrastructure that a more rational and explicitly coordinated administrative justice system would have to offer. The challenge now squarely in front of reformers is to identify suitable approaches to institutional change that will thread these disparate elements into a more coherent whole.²⁶

While Canada remains a patchwork quilt of administrative bodies (even if some steps towards coherence are evident, as discussed below in the context of the Administrative Tribunals Support Service), other jurisdictions have moved towards setting out shared design principles and shared evaluative standards for tribunals. For example, the New Zealand Law Reform Commission, in a thorough review of that country's tribunal systems, identified a number of desirable characteristics that individual tribunals, or systems of tribunals should exhibit, including:

- Public accessibility, both in terms of costs and in public awareness of opportunities to seek redress;
- Membership and expertise appropriate to the subject matter;
- Actual and apparent independence;
- Procedural rules which secure the observance of natural justice, but which will also be simpler and less formal than the courts (and may be more inquisitorial);
- Sufficient powers to carry out their functions, and which are proportionate to those functions;

²⁶ See Lorne Sossin and Jamie Baxter, "Ontario's Administrative Tribunal Clusters: A Glass Half-Full or Half-Empty for Administrative Justice" (2012) 12 Oxford Commonwealth Law Journal 157 at 162.

- Appropriate avenues for appeal or review of tribunal decisions, in order to ensure oversight and error correction; and
- Speedy and efficient determination of cases.²⁷

Canada also appears to lag behind with respect to a detailed literature on tribunal users as has developed elsewhere in the common law world.²⁸

The *Leggatt Report* in the U.K. suggests that failure to achieve the advantages inherent to a tribunal system most often arises from inadequacies in tribunal design, and suggests that tribunal design focus on:

1. Structural coherence, involving considerations such as avoiding isolation and narrowness of outlook, sufficient investment in training, attracting and retaining suitable staff, and effective systems of administrative support;
2. Independence, including public perception of independence, which is associated with appointment processes, security of tenure, and whether the tribunal is administered by a department with an interest in the outcome of decisions;
3. User friendliness, which will reduce the need for professional representation, through such elements as information for users and independent help and support for them.²⁹

While a standard for evaluating the performance of administrative tribunals has yet to emerge in Canada,³⁰ the Council of Australasian Tribunals has developed a framework of

²⁷ New Zealand Law Reform Commission, *Tribunals in New Zealand* (January 2008) 2.67, online: <http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP6.pdf>.

²⁸ See, for example, Hazel Genn, Ben Lever, Lauren Gray, *Tribunals for Diverse Users*. (UK: Research Unit, Department for Constitutional Affairs, Justice Rights and Democracy, 2006) at http://www.dca.gov.uk/research/2006/01_2006.pdf. For a Canadian example of this kind of study, see Marcia Valiante, and W.A. Bogart, "Helping Concerned Volunteers Working out of Their Kitchens: Funding Citizen Participation in Administrative Decision Making," (1993) 31 *Osgoode Hall L. J.* 687. See also Council of Canadian Administrative Tribunals, "Literacy and Access to Administrative Justice in Canada: A Guide for the Promotion of Plain Language" (Ottawa: Council of Canadian Administrative Tribunals, 2005).

²⁹ See Leggatt Report, *supra* note . See also L. Sossin, "Reflections on the U.K. Tribunal Reform: A Canadian Perspective" (2011) 24 *C.J.A.L.P.* 17.

³⁰ Various attempts at developing such a standard have been undertaken in some Canadian jurisdictions and settings. See, for example, Society of Ontario Adjudicators and Regulators, "Toward Maintaining and Improving the Quality of Adjudication: SOAR Recommendations for Performance Management in Ontario's Administrative Justice

tribunal excellence in 2012 (revised in 2014) which has been widely accepted as an evaluative framework for administrative tribunals.³¹

COAT's approach to tribunal excellence has three broad dimensions:

- predictable, just decisions;
- procedural justice; and
- the delivery of a fair and efficient dispute resolution service.

These three dimensions of tribunal excellence are reflected in the COAT Framework. Predictability relates to consistency and certainty – users who appear before different panels or locations of a tribunal or different formats – online or in person – ought to have the same principles applied in similar ways. In other words, different tribunal members faced with the same facts should, broadly speaking, reach the same outcome. A 'just decision' is one based solely on the application of the relevant law to the facts of the case and is inconsistent with bias, ulterior motives or arbitrary factors. Procedural justice includes fairness, accessibility and user satisfaction (even and especially among losing parties in a dispute). These factors together contribute to the perceived legitimacy of the justice system and the application of public authority.

Moorhead, Sefton and Scanlan (2008) found that five process oriented factors contributed to user satisfaction:

1. The expectations of, and information provided to, participants;
2. The quality of participation granted to participants (ie. the extent to which, and the process through which, participants are able to get their story out in a way they view as accurate and fair);
3. The quality of treatment and, in particular, the respect shown to the participant during their time at the tribunal;
4. Issues of convenience and comfort – including timeliness and efficiency; and
5. Judgments about tribunal members and staff – whether they were perceived as helpful and empathetic.³²

System,” (1996) Can. J. Admin. L. & Prac. 179. See also Steven Hoffman and Lorne Sossin, “Evaluating the Impact of Remedial Authority: Adjudicative Tribunals in the Health Sector” in K. Roach & R. Sharpe (eds.), *Taking Remedies Seriously* (Montreal: CIAJ, 2009) pp.521-548.

³¹ COAT Framework of Tribunal Excellence

<http://www.coat.gov.au/images/downloads/INTL%20COAT%20FRAMEWK%20TRIB%20April%202014.pdf>.

³² Richard Moorhead, Mark Sefton and Lesley Scanlan, “Just satisfaction? What drives public and participant satisfaction with courts and tribunals” (2008) Ministry of Justice Research Series 5/08 March 2008, Cardiff Law School, Cardiff University at 4 April 2011.

In light of these core values and user-centred approach, COAT's Framework identifies eight measures of excellence against which all tribunals should be assessed.

1. Independence;
2. Leadership and Effective Management;
3. Fair treatment;
4. Accessibility;
5. Professionalism and Integrity;
6. Accountability;
7. Efficiency; and
8. Client Needs and Satisfaction.

The assessment process consists of detailed survey questions on each of these eight factors, resulting in an overall "score." The framework includes a variety of elements which overlap with human centred design approaches (from client needs to accessibility and fair treatment) as well as areas that track more conventional top-down approaches to administrative justice. The Ontario Bar Association established a working group on the COAT Framework and it already has been adopted in the planning cycle of several tribunals in Canada.³³

Tribunal design also must take into consideration other general legal constraints. Such constraints, as suggested above, must begin with the jurisdiction afforded a tribunal by statute. Statutes (or Regulations issued under such statutes) may also address methods or frameworks for dispute resolution, and the criteria by which disputes will be resolved.³⁴ Additionally, some jurisdictions have statutes of general applications to tribunals, such as B.C. *Administrative Tribunals Act*, or Ontario's *Statutory Powers Procedures Act* (SPPA).³⁵ The SPPA sets out basic procedural requirements for tribunals when holding hearings, for example, with respect to notice requirements, written or electronic hearings, admissible evidence, parties to the proceeding and many other matters.³⁶ Ontario's

³³ On the relationship between developments in Australia, Canada and other peer jurisdictions in areas of administrative justice, see L. Sossin, "Administrative Justice in an Interconnected World" Australian Institute for Administrative Law" (2014) 27 Canadian Journal of Administrative Law and Practice (CJALP) 53.

³⁴ See <https://www.oba.org/Member-Login?ReturnUrl=%2fSections%2fAdministrative-Law%2fArticles%2fArticles-2013%2fApril-2013%2fNEW-OBA-WORKING-GROUP-ASSIGNMENT-A-Framework-for-T>.

³⁵ B.C. *Administrative Tribunals Act*, SBC 2004 c.45 at http://www.bclaws.ca/civix/document/id/complete/statreg/04045_01 and *Statutory Powers Procedure Act* R.S.O. 1990, c.S22 at <https://www.ontario.ca/laws/statute/90s22>.

³⁶ *Ibid.*

Adjudicative Tribunals Accountability, Governance and Administration Act (ATAGAA) is another example of general legislation affecting tribunals, which sets out requirements for public accountability documents, such as service standards, business plans, consultation policies, mandate and mission statements and member accountability frameworks. ATAGAA outlines standards for member appointment processes, permits the creation of tribunal clusters; and includes other requirements aimed at promoting tribunals that are, “accountable, transparent and efficient in their operations while remaining independent in their decision-making.”³⁷

In light of these backdrops, and the methodology of human centred design discussed above, I propose the following framework for evaluating new or restructured administrative tribunals.

1) Identifying the Needs

In the past, the need for new initiatives in administrative justice often arose through a top-down process of policy leadership. The justification for these initiatives was often by and for elites and related to arguments about accountability, independence and expertise. For example, the McCruer Report in 1968 articulated a model of public oversight for self-governing professions that provided the groundwork for the establishment of the Ontario Health Professions Appeal and Review Board.³⁸ The actual design and jurisdiction of the tribunal established through the *Health Disciplines Act* in 1974 was the result of a political compromise between the Government, self-regulating health professions and other experts and advocates.³⁹ While the needs of patients or “the public” may have been invoked during these discussions, the process of negotiating the structure and mandate of the tribunal itself was conducted behind closed doors, and few members of the public beyond representatives of health professionals were involved in any way in the process.

From a design perspective, identifying the needs to which a particular tribunal or other administrative body will respond ought to involve a collective, transparent, and empathetic needs assessment. This process can (and arguably must) also involve a process of refining the public interest and ensuring the democratic legitimacy of any resulting legislation of Governmental action. The combination of a user-focused needs assessment, together with a policy-making process and the democratic legitimacy

³⁷ The *Adjudicative Tribunals Accountability, Governance and Administration Act*, S.O. 2009, c. 33, Sched. 55, s. 1. See also discussion of ATAGAA in J. Baxter and L. Sossin, “Ontario's Administrative Tribunal Clusters: A Glass Half-Full or Half-Empty for Administrative Justice” (2012) 12 Oxford Commonwealth Law Journal 157-87.

³⁸ See HPARB submission to HPRAC (2008) at <http://hprac.org/en/projects/resources/hprac-1457May30HPARB.pdf> at Appendix “A”. I should add that I serve as a member and designated Vice-Chair of HPARB and none of the views expressed herein reflect those of the Board.

³⁹ Ibid.

inherent in legislation empowering new or reformed tribunals is a distinct feature of designing administrative justice.

2) Setting out Purposes and Principles

The public interest inherent in the design of administrative justice requires a transparent articulation of the purposes and principles of new or reformed administrative bodies. The process of setting out purposes and principles itself flows from the needs assessment and policy process indicated above and should involve consultations and user participation to the extent possible.

In virtually every case, the articulation of purposes and principles will include a clear justification for why the administrative body and its authority/discretion is necessary, and also a specific account of the extent to which the administrative body has a mandate to be accessible to users.

3) Determining the Best Model to advance the Purposes and Principles

With needs identified and purposes and principles articulated, the third aspect of the design framework for administrative justice involves determining the best model to address those needs, purposes and principles.

While a caveat is needed about over-generalizing in relation to such a diverse sphere, it is fair to say that administrative bodies often are located in office buildings in the midst of other public sector or broader public sector office complexes (ministries, agencies, etc). They are rarely marked at street level, rarely located where most of their users live and work, and their look and feel might be characterized charitably as “bureaucratic.” Those fully capable of navigating a dispute resolution process on-line immediately are required to show up in person at a date weeks or months away, while those with complex needs who require in-person support to navigate the process effectively are too often routed to a call-centre or website. These dysfunctional situations are the product of design flaws. The flaws, moreover, flow not just from the absence of meaningful roles for users in the process (the focus of the design movement), but also the presence of structures which impair well-designed outcomes. For example, those who work carefully on the needs assessment, or on the development of purposes and principles, typically are not those that decide where public agencies are located or how their physical plant (or information technology) is organized. Different people working on different problems in different places with different expertise and incentives are unlikely to collaborate on design solutions.

The structures of administrative justice are particularly ill-conceived for the demands of design thinking. All administrative bodies at the federal or provincial/territorial level have a host or affiliated ministry, responsible not only for submitting budgets on behalf of

those bodies, but also for key aspects of public administration relating to these bodies (discussed further below in relation to the case study of a new federal structure intended to integrate and modernize the support of multiple tribunals). These may or may not be the same ministries responsible for developing the legislation empowering such administrative bodies and the design process underlying a tribunal's jurisdiction, scope and policy context. Different ministries, in turn, administer government services, government infrastructure and government real estate. So, it is understandable that a new tribunal may have one group in government devoted to designing the mandate of the tribunal, another group in government focused on the budget and staffing of the tribunal and still another group looking for appropriate and cost-effective space in light of the existing stock of real estate, all before a single member of the tribunal has been appointed or user of the tribunal has sought out its services.

This structural divide means the practice of administration justice too often undermines its purposes and principles. This is not to say the structures of administrative justice themselves have not been designed; rather, their design reflects other priorities and constraints. For example, moving tribunals from host ministries to "clusters" as occurred in Ontario was intended to create both economies of scale (to enhance the capacity of the resulting cluster to meet the needs of users of the tribunals which make up the cluster) and enhance the independence of tribunals from government itself.

These administrative law protections are reflected in the COAT Framework of Excellence, and in the jurisprudence on administrative law in Canada, which includes the independence and impartiality of administrative decision-makers as a key aspect of the duty of fairness and the procedural rights for those affected by administrative decisions. In focusing the debate in administrative justice more on design goals, it is important not to lose sight of the realities of government and the importance of those administrative law protections.

One reality is the Constitutional constraint in Canada limiting the subject matter which can be assigned to a tribunal. One aspect of this constraint is federalism, so that in some areas tribunals are created for overlapping purposes (labour tribunals and human rights tribunals, among others) to reflect Canada's distinct division of powers. Another, more specific standard relating to tribunals is the constraint on Governments transferring certain powers from superior courts to administrative tribunals.

Since 1981, the leading case on this interpretation of s.96 of the Constitution Act, 1867, and the power of provincial legislatures to confer jurisdiction to administrative tribunals has been *Reference Re Residential Tenancies Act (Residential Tenancies)*⁴⁰: In his decision, Dickson J. (as he then was) formulated a 3-part test to determine whether the power conferred to an administrative tribunal is constitutional. The test was as follows:

⁴⁰ *Re Residential Tenancies Act, 1981* [1981] 1 SCR 714.

- 1) A determination of “whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts (a s.96 court) at the time of Confederation”.
- 2) If yes, a determination of “whether the function in question is “judicial” in its institutional setting” as opposed to policy making functions.
- 3) If yes, a determination of the “context in which the power is exercised” - whether the “judicial powers” are merely ancillary to general administrative functions assigned to the tribunal or necessarily incidental to the achievement of a broader policy goal of the legislature” rather than the “sole or central function of the tribunal.”
 - a. If so, the conferring of judicial power is valid.
 - b. If not- the tribunal “is said to be operating like a s.96 court” and the grant of power is invalid.

This test was moderately amended in *Sobeys Stores Ltd. v Yeomans 1989* by Wilson J. who stated that the characterization of the “powers” in part 1 of the test “should highlight the type of dispute rather than the type of remedy sought”⁴¹ and must be applied narrowly. She treated this act of characterization as a preliminary step to the stage 1 of the 3-stage test from *Residential Tenancies*. Wilson J. also clarified that the first step in the *Residential Tenancies* test must refer to powers that were exclusive to s.96 courts at the time of confederation, not “shared,” meaning, “broadly co-extensive” with inferior courts⁴².

The *Reference Re Amendments to the Residential Tenancies Act (N.S.) (1996)* provided further clarifications to the three-part test. The court found that the Act, which confers powers to adjudicate disputes between landlord and their residential tenants exclusively to the Director of Residential Tenancies with the power to appeal to a Residential Tenancies Board, did not violate s.96 of the Constitution Act, 1867. The result was concluded in part one of the test, as the jurisdiction to hear disputes between landlord and tenants were not within the exclusive core jurisdiction of superior courts in 1867. Chief Justice Lamer explained that the “core jurisdiction” for the purposes of this test is “very narrow...includes only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system.”⁴³ While the Justices disagreed with respect to whether this jurisdiction was a “novel jurisdiction”, all agreed that the act conferring such powers was constitutional.

⁴¹ *Sobeys Stores Ltd. v. Yeomans*, [1989] 1 SCR 238, at para 21. See also *MacMillan Bloedel Ltd. v. Simpson* [1995] 4 S.C.R. 725.

⁴² *Supra*. *Sobeys Stores*, at para 31.

⁴³ *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186, at para. 56.

Beyond Constitutional constraints, legislatures have wide latitude in the structure and jurisdiction provided to new administrative bodies.⁴⁴ Administrative law provides a range of protections within the confines of the statutory mandate, just as other statutes may provide minimum standards for administrative tribunals to follow (such as Ontario's *Statutory Powers Procedure Act*⁴⁵) unless exempted by statute.

Just as the requirements of Constitutional and administrative law must be kept in mind, so must the realities of scarce resources and competing government priorities. All tribunals require resources to achieve their mandates, but where those resources come from may vary. Some administrative bodies are funded by users (for example, Securities Commissions and Law Societies) while most will be funded by public revenues. Whatever the source of resources, the determination of a tribunal's budget has critical implications for its staffing, technological infrastructure, physical presence and other key design features..

Against this backdrop, bifurcating the development of public authority and public administration in the context of administrative justice is a good example of a practice that is inconsistent with the very premise of design thinking, and also seems to work against key principles of administrative law and key goals of government for more efficient and effective delivery of services in the broader public sector.

For these reasons, I argue that the determination of the best model to address the needs, purposes and principles of an administrative body must be a holistic enterprise, involving the expertise of policy-makers and lawyers, administrators and IT professionals, organizational and behavioural specialists together with communication experts. All aspects of the tribunal experience should be considered together – that is, the statutory authority of the tribunal together with its physical and virtual presence, the budget and staffing of the tribunal together with its approach to proportionality or streaming of caseloads, the rule-making together with the strategies for accessibility, inclusion and accommodations.

4) Pilots for Evaluation, Continuous Improvement

Returning to the innovations of the design movement, the determination of the best model, and entrenching that model, together with the purposes and principles identified above, in legislation, does not end the design process. In many ways, that legislation simply represents the point of departure for the most valuable part of the design process – the testing of effectiveness of the model by users, and adjustments/adaptations made in light of that evaluative process.

⁴⁴ For discussion, see *Ocean Port*, supra note . See also Philip Bryden, “Structural Independence of Administrative Tribunals in the Wake of *Ocean Port*” (2003) 16 C.J.A.L.P 125.

⁴⁵ R.S.O. 1990, c. S-22.

For administrative justice, the evaluative process has been notably absent.⁴⁶ Whether undertaken by tribunals or clusters of tribunals themselves, or by outside evaluators or by government itself, the metrics and methods for assessing the effectiveness of administrative justice are remarkably under-developed – though initiatives such as the COAT framework (and its antecedents in user satisfaction surveys) discussed above have at least put evaluation on the radar in Canada. I believe design thinking advances this search for ways of evaluating the success of administrative justice providers.

Below, I explore how this proposed framework might be used in relation to specific tribunal settings, and assess recent initiatives involving the design of administrative justice. I consider as case studies the new Ontario model for auto insurance disputes within the License Appeal Tribunal (LAT) within the Safety Licensing Appeals and Standards Tribunals Ontario (SLASTO), the recently established federal Administrative Tribunal Support Service (ATSSC) and a proposed new model for guardianship dispute resolution explored by the Law Commission of Ontario.

A. License Appeals Tribunal and Auto-Insurance Disputes in Ontario

In 2012, the Ontario Government announced a review of its auto insurance dispute resolution system.⁴⁷ The Review was intended to address a number of challenges identified with the existing model (administered through the Financial Services Commission of Ontario (FSCO)). The Review was called against a backdrop of continuously rising settlement amounts for auto insurance disputes, a doubling in the number of mediation applications between 2007-08 to 2011-12 with no appreciable rise in the number of motor vehicle accidents over this period, and escalating numbers of cases going to the courts from FSCO, resulting in additional cost and delay to the parties.

The Review, undertaken by Douglas Cunningham, former Associate Chief Justice of the Superior Court for Ontario, commenced in 2013. Following extensive stakeholder consultations (which can often mean hearing more from counsel and industry representatives than actual claimants), Cunningham issued a set of design principles for the new dispute resolution model he would be recommending:

- Timeliness (access to resolutions should be quick and not require the intervention of the courts);

⁴⁶ For discussion, see S. Hoffman and L. Sossin, “The Elusive Search for Accountability: Evaluating Adjudicative Tribunals” (2010) 28 Windsor Yearbook of Access to Justice 343-360.

⁴⁷ See Douglas Cunningham, *Final Report, Ontario Automobile Insurance Dispute Resolution System Review* (February 2014) at Ontario Automobile Insurance Dispute Resolution System Review (AIDRS) at <http://www.fin.gov.on.ca/en/autoinsurance/drs-final-report.pdf>.

- Proportionality (varying processes should be available based on the varying complexity of cases);
- Accessibility (claimants should be able to access the system without difficulty with or without counsel);
- Predictability (in other words, parties should be able to predict outcomes in accordance with a reasonable range based on transparent principles);
- Streamlining (in other words, as little paper and process as possible)
- Costs (in other words, a cost-effective model with as little possibility for gaming and abuse as possible);
- Culture (a culture of early dispute resolution should be encouraged)⁴⁸

While not framed as “design thinking,” and not following the methodology set out above for continuous user feedback, Cunningham’s AIRDS Review nonetheless reflects a shift in culture in administrative justice toward a more responsive, adaptable and user-centric approach, and for these reasons merits attention.

Based on these principles, and subsequent to further consultations and analysis, Cunningham recommended moving the AIDRS from FSCO to LAT, streamlining a number of stages into a new more comprehensive settlement conference, introducing video conferencing and other new technologies to enhance easier and more cost-effective access, and a number of other important changes reflective of a design shift to a user-centred focus.⁴⁹

The recommendations of the Cunningham Review were adopted and incorporated into new legislation passed in Ontario in 2015. As of April 1 2016, accident benefit arbitration applications are received by LAT rather than the FSCO.⁵⁰ The process is similar in some respects, but some changes have been made to the auto insurance dispute resolution system in order to make the dispute resolution process more streamlined, and as a result, more user-friendly.⁵¹

The major change to the process is the removal of the mandatory mediation in advance of arbitration. An applicant is now able to apply to LAT for his or her benefit immediately upon that benefit being denied or terminated. All parties and their representatives will be required to attend a case conference, at which all preliminary issues will be dealt with,

⁴⁸ *Ibid.* at p.3

⁴⁹ *Ibid.* at Appendix A setting out the list of recommendations by the Review.

⁵⁰ I disclose that I served as Chair of an Advisory Committee established by the Attorney General to provide input into the transition of auto insurance dispute resolution from FSCO to the LAT. This role ended on May 31, 2016. None of the views expressed in this paper reflect the discussions or positions of that Advisory Committee.

⁵¹ <http://mccagueborlack.com/emails/articles/lat-coming.html>.

settlement will be discussed, the type of hearing will be decided, and a hearing date will be set. If the matter does not settle at the case conference, the hearing will proceed as scheduled. LAT has a hybrid approach to its adjudicative phase, which may involve written or in person hearings Expedited, electronic hearings (e.g. telephone hearings) are expected for most other disputes, while in-person hearings will be reserved for the most serious cases such as catastrophic impairment determination. Written and electronic options were available at the FSCO, but were rarely used except for simple motions. The LAT intends that in-person hearings will be held only when necessary.⁵²

When handled by FSCO, most disputes with insurers were resolved in mediation, and claimants had the option to proceed to trial if a settlement had not been reached. Under the new system, a formal mediation step has been removed and most claims will be resolved prior to adjudication through a case conference aimed at settlement.⁵³ The time required to settle a dispute will now be under 120 days in most cases.⁵⁴ As well, the LAT has kept the user experience in mind as they have indicated that the new form for filing an application for arbitration will be simplified, and hope to eventually accept electronic filings and fee payment.⁵⁵

One area of the new model that has been subject to criticism is the removal of the right of users to sue for accident benefits disputes in the Superior Court of Justice.⁵⁶ Rather, users have the option first to seek a reconsideration, and subsequently (or if that a reconsideration is not held), to request a “judicial review” by the Divisional Court of a LAT decision if dissatisfied, or can appeal within 30 days on the basis of a legal mistake. Although the new process has limited some user options, this has been done in conjunction with increasing the efficiency and simplicity of the overall process. This dynamics reflects the trade-offs that often characterize the design approach and the importance of purposes and principles. If the protection of the rights of those involved in motor vehicle accidents is paramount, then the ability to sue for accident benefits in Court should be the priority. If, on the other hand, just, fair and expeditious settlements are the goal, then limiting rights to sue advances important design goals.

The design of the AIDRS has followed a two-stage approach – while user feedback was sought in the phase of developing the model, user-feedback is also informing the implementation of that model.

⁵² *Ibid.*

⁵³ <http://torontospersonalinjurylawyer.com/taverniti-vashishth-llp-comments-changes-licence-appeal-tribunal-regarding-insurance-disputes/>.

⁵⁴ *Ibid.*

⁵⁵ <http://mccagueborlack.com/emails/articles/lat-coming.html>.

⁵⁶ <http://www.millerthomson.com/en/blog/ontario-insurance-litigation-blog/the-alphabet-soups-new-letters-slasto>.

The AIDRS, more commonly known as AABS, Automobile Accident Benefit Services. Phase 2 is known as the Transition and Full Implementation phase and will take place over the next 18 – 24 months (from April 1, 2016). This phase will focus on the following:

- Continuation of phased recruitment approach.
- Delivery of E-Filing.
- Completion of Case Management System.
- Performance indicators and data analysis.
- Workflow analysis and long-term resource assessment.
- Operational policy and planning capacity and supports

Based on the framework I develop above, it is possible to assess the auto insurance dispute resolution process fairly clearly (though its implementation is in the early stages and so a final evaluation is premature). The Government decision to launch the Cunningham Review and the conduct of that Review reflects attentiveness to needs assessment, stakeholder involvement and the articulation of purposes and principles, though it also highlights the challenge of incorporating user voices in those early stages of the process. The process likely would receive relatively high scores on these aspects of the framework. The Review provides relatively little guidance on the public administration aspects of the new model, which have been left with the LAT and SLASTO cluster largely to determine, and there are no clear mechanisms for evaluation, assessment, and revision. The process likely would receive low scores on these aspects of the design framework.

The discussion above also highlights the kind of questions which design thinking adds to the conversation about administrative justice – not just in relation to individual tribunals but also with respect to the sector as a whole (at least within particular federal or provincial/territorial and municipal jurisdictions.) For example, should support services for administrative bodies be designed across the sector to capture economies of scale and address unevenness between large and small tribunals by centralizing administrative tribunal services, or should such services be customized to the distinct needs of each tribunal. This dilemma resulted in a recent restructuring of administrative tribunal support at the federal level. As discussed below, I believe a design framework along the lines set out above may provide an effective framework with which to evaluate this new scheme.

B. Administrative Tribunals Support Service of Canada

In 2014, Parliament passed the *Administrative Tribunals Support Service of Canada Act*,⁵⁷ intended to usher in a new era of modernization and efficiency in the operation of administrative justice in Canada. Interestingly, the Act contains no mention of any purpose in the creation of the new support service, or mandate for its activities. The news

⁵⁷ <http://laws-lois.justice.gc.ca/eng/acts/A-1.5/>

release upon the passage of the Act is somewhat more informative. The Government indicated the benefits of the new structure to be as follows:

Benefits of this change

There are several benefits to consolidating the provision of support services for these administrative tribunals, including the following:

Improving capacity to meet the administrative needs of tribunals

Many of these tribunals are small organizations with limited resources. Tribunals themselves have identified access to support as an on-going challenge, in some cases, due to their size. The ATSSC will bring together staff and consolidate resources in a single, integrated organization that will strengthen the capacity to support tribunals' needs. For example, some tribunals may currently rely on one person for all their human resources services; the ATSSC will provide access to a broader range of specialized employees in areas such as staffing, labour relations and training.

Improved access to justice for Canadians

A centralized organization will be able to better use technology and implement best practices to aid access to justice through modernized operations. Some benefits could include a more widespread use of the following:

- videoconferencing for hearings and other alternative options to in-person interaction, to offer greater flexibility for those appearing before the tribunals; and
- comprehensive Web content about processes, past decisions or any other information relevant to the public that may require the services of a tribunal.

The ATSSC will contribute to improving the efficiency and effectiveness of the tribunals' decision-making processes - an important component of access to justice.

Efficiencies through economies of scale

Efficiencies can be achieved by sharing some resources and having a centralized and versatile team with administrative and other expertise. ATSSC employees possess a broad range of skill sets and expertise that will help meet the support service needs of the tribunals and will ensure consistency across tribunals. Moreover, the ATSSC will also provide an opportunity to share best practices among previously separate organizations. Many tribunals have identified support

challenges in their annual reports and see partnerships and the sharing of resources as a means to address operational limitations.⁵⁸

The Administrative Tribunals Support Service of Canada (ATSSC) is responsible for providing support service to 11 federal administrative tribunals by way of a single, integrated organization.⁵⁹ Services include the specialized services required by each tribunal (e.g. registry, research and analysis, legal and other case-specific work), as well as corporate service (e.g. human resources, financial services, information technology, accommodations, security, and communications). By creating this one single body to provide support for these administrative tribunals, the government aims to improve the capacity and become more operationally efficient in order “to better meet the administrative needs of federal tribunals and to improve access to justice for Canadians.”⁶⁰ The ATSSC will focus on improving management practices and controls by increasing the use of common processes and systems, standardizing internal services processes, adopting new technologies, making better use of facilities, reducing the need for outsourcing services, and identifying other cost-saving efficiencies that will achieve results and value for resources.

Improving the capacity to meet the administrative needs of tribunals contains elements of a human-centered approach. Many of the tribunals are small organizations with limited resources, and support is an on-going challenge due to their size.⁶¹ As the ATSSC brings together staff and consolidates resources in a single, integrated organization that will strengthen the capacity to support tribunal needs, this could possibly translate to a more efficient and accessible process for users. As well, a centralized organization may be able to better use technology and implement best practices to aid access to justice through modernized operations. Some benefit could include a more widespread use of videoconferencing, which would offer greater flexibility for users of the tribunals, and comprehensive on-line content about processes, past decisions, or any other information relevant to the user’s experience.

Although the consolidation may improve the user experience, it is important to note that the change is largely motivated by minimizing costs through creating efficiencies and

⁵⁸ <http://news.gc.ca/web/article-en.do?nid=897239>.

⁵⁹ https://www.canada.ca/en/administrative-tribunals-support-service/index.html?_ga=1.172215587.1829801473.1466603549.

⁶⁰ <https://www.canada.ca/en/administrative-tribunals-support-service/transparency/rpp20152016.html>.

⁶¹ <http://news.gc.ca/web/article-en.do?nid=897239>.

eliminating the duplication of facilities.⁶² As well, there are concerns about potential conflicts of interests, which could have a negative effect on the user's experience. Specifically, inclusion of the Canadian International Trade Tribunal (CITT) could expose decisions to allegations of conflicts of interest as foreign trading partners and domestic industry claimants who appear before the CITT often have Department of Justice lawyers opposing them.⁶³ CITT staff that collect data, conduct investigatory research, and assist in drafting the decisions would now be employed by the same Department of Justice..

Additionally, the process by which this significant reform was developed appears at odds with the design framework set out above. The Government announced the change through an omnibus budget bill which meant almost no time for debate or discussion of its terms or implications.⁶⁴ Among others, University of Ottawa Law Professor Errol Mendes suggested that the new agency fundamentally changes a critical piece of Canada's administrative justice and legal system and "shouldn't be rammed through in budget legislation without proper analysis and debate." He also noted the Chief Administrator of the new agency under the Act is appointed by Government and serves "at pleasure." In light of the lack of any apparent needs assessment, or collective and consultative process around the purposes and principles of the new service, not to mention an absence of a discussion of the optimal model for supporting tribunals, it is likely the new service, whatever its potential merits for the operation of the sector or particular tribunals, would score poorly against the design framework set out above.

Beyond what works for a particular tribunal or for an administrative justice sector more broadly, design thinking also may inform the analysis of whether certain kinds of dispute resolution should remain with the courts (or a government department) or be integrated into a tribunal. This context is explored below in relation to the area of guardianship over vulnerable individuals in Ontario.

C. Should Dispute Resolution move from Courts to Administrative Tribunals: the case of Guardianship?

The Law Commission of Ontario (LCO) recently considered this issue in relation to disputes over capacity and guardianship for vulnerable individuals (whether due to illness or disability) which are currently resolved through the Superior Court of Ontario. The LCO consulted broadly among groups representing users, and found that for those

⁶² <http://www.mcmillan.ca/Penny-Wise-Pound-Foolish-Federal-Government-Proposes-to-Combine-Back-Office-Work-of-Eleven-Federal-Tribunals-and-Boards-into-One-New-Mega-Administrative-Agency>.

⁶³ [Ibid.](#)

⁶⁴ See Kathryn May, "Super Agency for Federal Tribunal Raises Concerns" (April 1, 2014) *Ottawa Citizen* at <http://o.canada.com/uncategorized/super-agency-for-federal-tribunals-raises-concerns>.

directly affected by the laws relating to capacity disputes, “the ability to be meaningfully heard on issues that affect their lives is central to their wellbeing. In evaluating mechanisms for access, the key consideration is whether the proposed forum provides a meaningful, expert and accessible determination.”⁶⁵

[O]ur clients want their day in court. What that court is, is to be determined. But it should be more sensitised and almost individualised to our clients. Clients just want to be heard and if the CCB does it, great, Superior Court does it, but I wish there was a mechanism where everybody could be pleased that, you know, they've had a fair hearing, everybody had their fair say and a decision was reached. And that's, sort of, part of the recovery process ...⁶⁶

As the LCO observes, the Superior Court of Justice process is perceived to be complex, costly, time consuming and intimidating. The Court processes are not well suited to the needs of unrepresented individuals. Families and individuals often feel unable to navigate the system without costly legal assistance, and the system may be challenging to keep the individual who lacks or may lack legal capacity at the centre of the process. In short, effective dispute resolution is seen as beyond reach for many.

In its analysis, the LCO explores the most practical and effective dispute resolution option, including the option of creating a tribunal encompassing the jurisdictions of the Ontario Consent and Capacity Board and the Superior Court of Justice in this area. The LCO's final recommendation will build in part on a 2016 submission from the Advocacy Centre for the Elderly (ACE), which emphasized the enhanced accessibility of tribunals in relation to courts:

The courts are not the forum in which these types of cases can be dealt with most efficiently. In ACE's experience, guardianship applications brought through the courts can take many months, and, in contested applications, years. The costs can be significant and, where the assets of the incapable person are not similarly significant, it may not be practical, cost-effective or proportionate for a person of modest means to apply for guardianship over an incapable person.

ACE receives many calls from family member who are being denied access to an older adult by an attorney for personal care. ACE assists only the older adult in these circumstances. The only remedy available for these family members, if negotiation is not possible, is to take the attorney to court and seek directions on the power of attorney for personal care, or apply for

⁶⁵ Law Commission of Canada, *Legal Capacity, Decision-Making and Guardianship*, Interim Report (October 2015) at <http://www.lco-cdo.org/capacity-guardianship-interim-report.pdf>.

⁶⁶ Focus Group, Rights Advisers and Advocates, September 25, 2014 at <http://www.lco-cdo.org/en/capacity-guardianship-interim-report-appendixE>.

guardianship. The legal fees involved place these options beyond the means of many people.

Most importantly, the allegedly incapable person does not have easy access to the courts. Where the dispute is regarding a guardian of property or an attorney for property, the funds necessary to bring an application on one's own behalf are likely in the control of the attorney or guardian. If the allegedly incapable person cannot access their own funds, they cannot hire a lawyer. Nor is it likely that this person would have the ability to represent themselves in a complicated guardianship matter.

An administrative tribunal offers accessibility and flexibility. Guardianship proceedings could be resolved in weeks rather than in months or years. Applications for directions need not be as prohibitively expensive as going to court. Further, at an administrative tribunal, a simple application made by telephone by the allegedly incapable person could trigger the appointment of counsel, thus ensuring representation for this person.⁶⁷

Ironically, the key risk cited by the LCO in designing a tribunal rather than court based dispute resolution pathway is the risk of the tribunals becoming “judicialized,” which involves the trend in some tribunals toward more court-like, more formal and more costly.⁶⁸

This concern over ossification must be anticipated in the design process as well. A culture of innovation, experimentation and continuous improvement is difficult to sustain. With this in mind, the evaluation of tribunal design must consider not only the operational features of tribunals but also their resilience, adaptability, responsiveness and flexibility in the face of changing user needs, changing technology and changing approaches to an optimal user experience.

While it is too early to determine how this proposed new (or expanded) tribunal would measure up on the design framework set out above, it is noteworthy to see the user-centred design thinking underlying the Law Commission's analysis. It is also worth exploring what other settings, currently ill-suited to formal adjudication in courts, might benefit from multi-disciplinary or more flexible dispute resolution options in a tribunal or regulatory setting – such as family justice disputes.

The brief case studies discussed above show both examples of the culture shift toward user-centred administrative justice design, and the resilience of a more conventional top-down fragmented model of developing administrative justice.

⁶⁷ See ACE Submission 2016 at <http://www.advocacycentreelderly.org/appimages/file/ACE%20LCO%20submissions%203Mar2016.pdf>.

⁶⁸ LCO, *supra* note , citing Judith McCormack, “Nimble Justice: Revitalizing Administrative Tribunals in a Climate of Rapid Change” (1995) 59 Sask Law Review 385 at 5-6, 9-10.

Conclusions

In this paper, I have explored the implications of human-centred design for the development of administrative justice, and in particular for new or reformed tribunals. Based on the influence of design thinking, I have set out a proposed framework for evaluating tribunal reform, based on the extent to which that process is user-centred, and also consistent with the distinct public interest purposes and principles which animate administrative justice. I have applied this framework in the context of recent tribunal reform initiatives as part of a growing effort to establish evaluative criteria for administrative tribunals.

We are living through a transitional period in the development of administrative justice. While it is not clear how long the journey will take or how much can and will change along the way in how the public sector works, I believe design frameworks will transform how we think about administrative justice, and its effectiveness for users. This transformation, in turn, will lead to tribunals and other administrative bodies which look and act differently and, I hope, better meet the needs of users – and the public - in the future.